

## In rapidly changing circumstances, look to arbitration for flexible interim relief

April 2020

In the wake of COVID-19, businesses are finding the circumstances of their commercial relationships abruptly and drastically changing. At times, parties can [recognize impending financial stressors](#) in their counterparties and take action to mitigate that risk. But with the rapidly shifting world, disputes can manifest overnight. Events such as [sudden disruptions to supply chains](#) threaten to leave parties in the lurch and in need of immediate relief.

In such situations, parties often turn to domestic courts for interim relief. But while interim relief in courts is often perceived as fast-moving and broadly enforceable, national law often imposes strict requirements and limited proscribed forms of interim relief. Parties with arbitration agreements, however, have additional options regardless whether they just need immediate relief or if that relief will be followed by an arbitration proceeding to resolve a broader dispute. Interim relief in arbitration tends to be more flexible, allowing parties to advocate for remedies that suit their particular situation. Moreover, the standards for obtaining interim relief in arbitration in many cases can be more easily met. For example, arbitral tribunals may grant relief on a showing of serious or substantial harm rather than “irreparable” harm typically necessary in common law jurisdictions. They also avoid prejudging the merits and often require only a *prima facie* showing on the merits rather than a likelihood of success. It is critical for parties to be aware of the range of available relief in arbitration.

The chart below describes various forms of interim relief that may be available to parties in arbitration.

Type of Interim Relief	Description
<i>Preservation order</i>	A form of injunction seeking to maintain the status quo during the pendency of a dispute.  Examples include ordering preservation of goods or equipment that are the subject matter of the dispute; payment of disputed funds into escrow; or preventing a party from drawing on a letter of credit

<i>Order directing specific performance</i>	<p>Tribunals may be empowered to order specific performance of contract obligations on a provisional basis while the arbitration is pending.</p> <p>Examples include requiring a party to a sales agreement to continue shipping products while the effectiveness of contract termination is arbitrated; ordering a party to continue performing services; or allowing access to equipment or facilities</p> <p>Note, however, that specific performance is sometimes precluded in arbitration agreements.</p>
<i>Security for claims</i>	<p>An order for security protects against counterparty insolvency risk by preserving assets sufficient to guarantee payment of a final award.</p> <p>Typically requires a showing of likelihood that an award will not be satisfied.</p>
<i>Security for costs</i>	<p>Requires a party to post money or bond to secure payment of arbitration costs (including potentially reasonable attorneys' fees) if the party is unsuccessful in arbitration</p> <p>Tribunals typically consider the financial state of the party from which security is requested and any anticipated difficulty collecting a cost award. Counterparty's inability to satisfy cost award should result from changed circumstances. Likelihood of success on the merits typically not considered.</p>
<i>Orders for interim payment</i>	<p>Not strictly a form of interim relief, some arbitral tribunals may be empowered to issue an enforceable award for undisputed sums due on accelerated or summary basis, bifurcated from resolution of the overall dispute.</p> <p>Sum requested must be undisputed or indisputably due and payable.</p>

These measures can be ordered by tribunals during the life of an arbitration proceeding. But even if no proceeding is pending, parties are not left without recourse.

Even when an arbitration has not been initiated or a Tribunal is not yet constituted, most arbitral rules permit parties to submit applications for emergency arbitration concurrent with or subsequent to the initiation of arbitration. Under these rules, a temporary emergency arbitrator is appointed to hear the emergency claim for interim relief on an expedited schedule.

The chart below identifies the relevant emergency arbitration provisions in commonly used arbitration rules, and describes the timeline for such proceedings along with standards for granting relief and the type of relief available, to the extent proscribed under the rules.

Institution	Emergency Arbitration Provisions
<i>ICC</i>	<ul style="list-style-type: none"> <li>• Arbitrator normally appointed within two days of application</li> <li>• Procedural timetable normally established within two days of appointment</li> <li>• Order shall be made no later than 15 days from the date the file was transmitted (unless parties agree to an extension)</li> </ul> <p><b><u>(Appendix V: Emergency Arbitrator Rules)</u></b></p>
<i>ICDR</i>	<ul style="list-style-type: none"> <li>• Arbitrator shall be appointed within one day of notice of emergency relief</li> <li>• Procedural timetable shall be established within two business days of appointment</li> <li>• No deadline for issuance of order</li> <li>• The emergency arbitrator shall have the power to order or award any interim or conservancy measures that the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property</li> </ul> <p><b><u>(Article 6)</u></b></p>
<i>CPR (both Administered and Non-Administered Rules)</i>	<ul style="list-style-type: none"> <li>• Arbitrator shall be appointed within one business day of the application</li> <li>• No deadline for procedural timetable or order, but proceedings to be conducted “as expeditiously as possible”</li> <li>• The emergency arbitrator may grant such emergency measures as the arbitrator deems necessary, including but not limited to measures for the preservation of assets, the conservation of goods or the sale of perishable goods</li> </ul> <p><b><u>(Article 14)</u></b></p>

## *JAMS International Arbitration Rules*

- In most cases, emergency arbitrator appointed within 24 hours of receipt of application
- Procedural timetable shall be established within two business days
- No deadline for issuance of order
- Party seeking emergency relief must show that immediate loss or damage will result in the absence of emergency relief

### **(Article 3)**

Arbitration thus offers options to businesses that are concerned about the potential deterioration of their commercial relationships and require urgent relief. The Hogan Lovells International Arbitration team is available to help guide parties through this process.

## **Contacts**



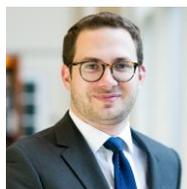
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